**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| WORLDCALL INTERCONNECT, INC. | ) | |
| a/k/a EVOLVE BROADBAND, | ) | |
| Complainant | ) | File No. EB-14-MD-011 |
| | ) | |
| v. | ) | |
| | ) | |
| AT&T MOBILITY LLC, | ) | |
| Defendant | ) | |

# AT&T MOBILITY LLC'S OPPOSITION TO THE APPLICATION FOR REVIEW OF WORLDCALL INTERCONNECT

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## I. INTRODUCTION AND SUMMARY

Pursuant to 47 C.F.R. § 1.115(f), AT&T Mobility LLC ("AT&T") submits this Opposition to the Application for Review filed by Worldcall Interconnect, Inc. ("WCX"), on October 24, 2016 (the "Application"), of the Enforcement Bureau's ("Bureau's") September 22, 2016 Order (the "September 22 Order"), which incorporates and makes final the Bureau's Interim Order dated April 14, 2016 (hereinafter, the "Order").[1]

In support of its request that the Commission vacate the Order and remand WCX's Complaint to the Bureau for further consideration, WCX's Application raises two sets of issues. *First*, WCX argues that the Bureau was obligated to apply the Commission's "automatic roaming" standards set forth in 47 C.F.R. § 20.12(d) because WCX intends to use AT&T's data roaming service (which is not interconnected to the public switched network) to provide services to its customers that WCX alleges will be connected to the public switched network.[2] WCX further claims that the Bureau's Order "nullifies the automatic roaming rule."[3] *Second*, WCX contends that the Bureau erroneously analyzed the record evidence and improperly determined that the rates proposed by AT&T for data roaming service are commercially reasonable.[4] Neither of these issues has merit. Consequently, WCX's Application should be denied.

Contrary to WCX's argument, the just and reasonable standard governing "automatic roaming" does not apply to the data roaming services that WCX has sought from AT&T.[5] The

[1] *Worldcall Interconnect v. AT&T Mobility,* Proceeding No. 14-221, EB-14-MD-011, Order, (EB, Sept. 22, 2016) (incorporating and adopting, in their entirety, the rulings set forth in the Bureau's April 14 Interim Order, *Worldcall Interconnect v. AT&T Mobility,* EB14-MB-011, DA 16-396 (EB, April 14, 2016)). References below to the April 14 Interim Order are cited as "Order ¶ __;" references to the September 22 Order are cited as "Sept. 22 Order ¶ __."

[2] Application for Review of WorldCall Interconnect at 7-13 (Oct. 24, 2016) ("Application").

[3] *Id.* at iii.

[4] *Id.* at 13-24.

[5] *See* Legal Analysis in Support of AT&T's Answer at 41-43 (Nov. 5, 2014) ("AT&T Legal Analysis"). In its Final Offer, AT&T proposed rates for voice and SMS roaming. *See* Order, App. B, at 5 (AT&T Exhibit 8) (setting forth

automatic roaming rules apply only to "CMRS carriers if such carriers offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls."[6] As the record before the Bureau clearly established, the data roaming service that AT&T provides is not interconnected to the public switched network as traditionally defined and thus not subject to the automatic roaming rule.[7] Indeed, WCX admitted that, from AT&T's perspective, "the communications will look like non-interconnected communications" and "will be no different than when WCX's customer is surfing the web or receiving an e-mail."[8] Further, the fact that AT&T offers interconnected services to some of its other customers is of no relevance to the issue of which roaming rules apply to the service that AT&T will provide to WCX. Because the data roaming service that AT&T provides to WCX is not interconnected to the public switched network, the Bureau properly resolved WCX's challenge to AT&T's rate proposal under the Commission's data roaming rules.[9]

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AT&T's proposed rates). WCX, however, did not object to AT&T's proposed voice or SMS roaming rates. *See id.* ¶ 18 n.49 (explaining that "WCX's brief did not discuss any dispute concerning voice or SMS roaming terms")

[6] 47 C.F.R. § 20.12(a)(2); *see In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, ¶ 54 (2007) ("*Automatic Roaming Order*"); *id.* ¶ 56 (declining to impose automatic roaming obligation on "non-interconnected features of a competitors' network").

[7] The Commission reaffirmed in the *Net Neutrality Order*, that such data service is governed by the Commission's data roaming rules, not by Title II, regardless of how the requesting provider elects to utilize that service. *See Protecting and Promoting the Internet*, GN Docket No. 14-28, ¶ 526 (2015) ("We therefore forebear from application of the [commercial mobile radio service] roaming rule, section 20.12(d), to [mobile broadband internet access service] providers, conditioned on such providers continuing to be subject to . . . the data roaming rule codified in section 20.12(e)"). In its Application, WCX concedes that the *Net Neutrality Order* does not support application of Title II requirements to the data roaming at issue here. *See* Application at 3 n.13.

[8] WCX Legal Analysis (Second Amended Compl. at 271-72). WCX made the same point, that its usage would involve only data, during the course of its negotiations with **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[9] AT&T Legal Analysis at 6, 41-43. As to services that may be interconnected to the public-switched network, there is no dispute that AT&T's proposal will allow WCX to offer its customers in CMA 667 "nationwide voice, texting and other low-bandwidth interconnected" roaming services. *See* Application at 24.

Similarly lacking in merit are WCX's criticisms of the Bureau's finding that WCX had not met its burden of demonstrating that AT&T's proposed rates for data roaming service were not commercially reasonable. As explained in greater detail below, the Bureau carefully examined all of the rate evidence presented by the parties and, based on that review, concluded that WCX had failed to show that AT&T's proposed data roaming rates—**[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**—were commercially unreasonable.[11] Moreover, in reaching that conclusion, the Bureau (i) did not, as WCX contends, apply a presumption of reasonableness to AT&T's agreements,[12] (ii) carefully considered WCX's arguments regarding AT&T's so-called "strategic agreements" and explained why those "strategic agreements" were not "useful proxies in determining commercial reasonableness,"[13] (iii) analyzed the average effective roaming rates in "arm's length" agreements negotiated over the past two years,[14] and (iv) rejected WCX's argument that the rates in WCX's recent agreement with **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** "constitute better evidence of commercial reasonableness than the higher rates in AT&T's roaming agreements."[15]

The Bureau also examined the record evidence submitted concerning retail and international data roaming rates,[16] and concluded that AT&T's proposed rates were not

[10] Order ¶ 18.

[11] *Id.* ¶ 28.

[12] *Id.* ¶ 23 n.62.

[13] *Id.* ¶ 24.

[14] *Id.* ¶ 22 n.60.

[15] *Id.* ¶ 25.

[16] *Id.* ¶ 26.

"substantially in excess of AT&T's retail rates."[17] And, the Bureau properly rejected WCX's argument that commercially reasonable rates must "ensure WCX's ability to compete in the retail market place under its current business model," explaining that WCX had offered no evidence to rebut AT&T's showing that "comparable roaming rates" offered by AT&T "in dozens of AT&T agreements with rural and small providers had not rendered those providers' services unsustainable."[18]

In sum, WCX has not presented any basis for overturning the Bureau's Order.

## II. BACKGROUND

WCX is a wireless provider that holds a 700 MHz Lower Band (B Block) license to provide wireless services in Cellular Market Area ("CMA") 667, which covers an area of central Texas that is bounded by the major population centers of Houston, San Antonio, and Austin.[19] As the Bureau found and WCX appears to concede in its Application, CMA 667 is the only area in which WCX has a license and provides mobile wireless service.[20]

The record shows that WCX first approached AT&T regarding an LTE data roaming agreement in June 2011, and that AT&T first provided WCX with a draft LTE data roaming agreement on July 20, 2011.[21] That proposal was not acceptable to WCX, and over the next six months, the parties engaged in negotiations which were unsuccessful. Thereafter, WCX sought

[17] *Id.* ¶ 26. As to "resale/MVNO rates and international roaming rates," the Bureau found that there was "insufficient information in the record to make a determination regarding those issues." *Id.* ¶ 26 & n.79.

[18] *Id.* ¶ 26 n.78.

[19] *Id.* ¶ 7.

[20] *Id.* ¶ 16; *see* Application at 1-2. In its Order, the Bureau also "[found] no credible evidence that WCX is a facilities-based provider outside CMA 667," and also noted that WCX had not offered sufficient evidence to show that it intended to build such facilities in the future. Order ¶ 16 n.44. WCX states that it is "authorized to provide nationwide service using the 3650 MHz frequency," Application at 2, but it provides no citation to the record in support of this assertion. In any event, as the Bureau explained, there is no evidence that WCX has constructed any facilities outside of CMA 667. Order ¶ 16.

[21] AT&T Legal Analysis at 9-10.

permission to file a Complaint on the Commission's accelerated docket, which the Commission denied, explaining that WCX could file a Complaint pursuant to the Commission's standard rules.[22] WCX chose not to file a Complaint with the Commission, and AT&T heard nothing further from WCX about its data roaming request for over two years.[23]

On June 24, 2014, WCX forwarded to AT&T an "RWA Model Agreement," and proposed that it should serve as the basis for a data roaming agreement between AT&T and WCX.[24] On July 29, 2014, AT&T provided a proposed data roaming agreement to WCX.[25] After further negotiations, on September 8, 2014, WCX filed its initial Complaint, followed by an Amended Complaint on October 1, 2014, and a Second Amended Complaint on November 6, 2014.[26] In summarizing the nature of the negotiations between the parties, the Bureau explained that "[t]hroughout the course of these proceedings, the parties demonstrated a willingness to negotiate in good faith and, indeed, have conceded that '[g]ood faith is not an issue in contention.'"[27]

Rather, the principal matters at issue relate to the specific terms and conditions that would govern data roaming.[28] WCX initially proposed that the Bureau adopt the RWA agreement, but thereafter proposed a new agreement that WCX's counsel had cobbled together by picking and choosing favorable terms from AT&T's roaming agreements with other wireless providers that

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Order ¶ 9 n.24.

[27] *Id.* ¶ 11 (quoting parties' Joint Statement at 6, ¶ 34). Notwithstanding this joint representation by the parties, WCX now argues that it has been the victim of bad faith tactics by AT&T. Application at 2 ("WCX experienced many of the same difficulties during negotiations the Commission identified in its roaming orders"). WCX does not cite any record evidence in support of this claim, which is directly at odds with the Bureau's finding and WCX's own statements. Order ¶ 11. It should thus not be accorded any weight.

[28] Order ¶ 10.

AT&T had produced to WCX during discovery. [29] In stark contrast to WCX's novel proposal, AT&T's Final Offer was based upon AT&T's standard terms and conditions, with some modifications that were agreed to by the parties as a result of Staff-directed settlement negotiations in the Spring of 2015.[30]

Despite making progress, those settlement discussions were not ultimately successful. Consequently, early in the Summer of 2015, the FCC Staff directed that the parties exchange their Best and Final Offers and then submit additional briefing which identified the issues that remained in dispute.[31] That briefing was completed in September 2015. On April 14, 2015, the Bureau issued an Order with respect to two of the key issues in dispute: (i) the scope of AT&T's obligation to offer WCX data roaming, and (ii) the validity of AT&T's proposed rates for data roaming.[32] As to the first issue, the Bureau concluded that AT&T was not obligated to offer data roaming to WCX in all of the areas that WCX had requested; as to the second issue, the Bureau ruled that WCX had not demonstrated that AT&T's proposed rates are commercially unreasonable.[33]

More specifically, on the question of scope, the Bureau explained that the Commission had never "required a provider to offer data roaming to an entity that does not provide facilities-

[29] Responsive Brief of AT&T Mobility at 7-8 (Aug. 31, 2015) ("AT&T Responsive Brief"). During discovery, AT&T produced to counsel for WCX (and made available to Commission Staff) all of its data roaming agreements, including its strategic agreements, subject to the Protective Order that had been entered in the proceeding. Order ¶ 10 n.28 (explaining that AT&T had filed, under seal, its data roaming agreements in this proceeding, including its so-called "'strategic' agreements and its so-called 'arm's length' agreements").

[30] AT&T Responsive Brief at 6-7. The rates in AT&T's Best and Final Offer were in line with the lowest rates that AT&T was offering to and receiving from other providers and were significantly lower than the average effective rates that AT&T was being paid or paying for data roaming. *Id.* at 20-21.

[31] Order ¶ 10.

[32] *Id.* ¶ 1.

[33] *Id.*

based service to its customers."[34] Further, the Bureau found that there was "no credible evidence that WCX is a facilities-based provider outside of CMA 667, where WCX holds a 700 MHz license."[35] The Bureau thus concluded that "WCX's request to access AT&T's network in order to acquire customers who reside outside WCX's CMA constitutes a request for resale, rather than roaming, which AT&T has no obligation to provide under Section 20.12."[36]

As to WCX's challenge to AT&T's proposed data roaming rates, the Bureau concluded that the relevant question was whether "AT&T's proposed rates fall within a range of commercially reasonable rates."[37] In addressing that question, the Bureau examined the evidence presented by AT&T, which included (i) a detailed analysis of 30 agreements between AT&T and other domestic wireless service providers that yielded a weighted average effective roaming rate of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per MB, and (ii) a separate analysis of agreements that included LTE roaming rates that were "generally comparable to, and in some cases . . . higher than, the LTE roaming rates that AT&T ha[d] offered to WCX."[38] After considering both AT&T's and WCX's competing evidence, the Bureau found "WCX has not demonstrated that AT&T's proposed data roaming rates are commercially unreasonable."[39] Finally, the Bureau directed the parties to resume good-faith negotiations to resolve any remaining barriers to the completion of a roaming agreement, and report back regarding the progress of those negotiations.[40] If one or more issues remained unresolved, the Bureau

[34] *Id.* ¶ 15.

[35] *Id.* ¶ 16.

[36] *Id.*

[37] *Id.* ¶ 20.

[38] *Id.* ¶ 22.

[39] *Id.* ¶ 28.

[40] *Id.* ¶ 29.

explained that WCX could seek a further ruling addressing unresolved issues based on the present record.[41]

In response to the Bureau's Order, the parties resumed negotiations. At the same time, however, WCX sought clarification of that Order as it related to the scope issue. In its request, WCX did not raise any issues as to rates or the applicability of the automatic roaming rule.[42] On June 22, 2016, the Bureau issued a letter ruling confirming that "the commercially reasonable standard does not require AT&T to offer terms regarding roaming scope to accommodate WCX's plans to offer an unspecified facilities-based service in the future about which WCX provided scant evidence."[43]

Following the Bureau's June 22 Letter Ruling, the parties completed their negotiations and eventually executed a new roaming agreement.[44] The parties' roaming agreement was based upon AT&T's Final Offer. As a result, under the parties' agreement, the only WCX customers that can roam on AT&T's facilities are customers that take service in CMA 667.[45]

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[41] *Id.* ¶ 30.

[42] *See generally* WCX's Motion for Clarification (June 6, 2016).

[43] *See* Letter from Christopher Killion to W.Scott McCollough and James F. Bendernagel, Jr., *Worldcall Interconnect v. AT&T Mobility,* Proceeding No. 14-221, File No. EB-14-MD-001 at 2 (June 22, 2016) ("June 22 Letter Ruling").

[44] *See* Sept. 22 Order ¶ 2.

[45] *See* **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** In its Application, WCX contends that the negotiated terms of the final agreement "incorporate statutory and rule-based definitions for key terms related to mobile service and allow WCX to use its own technology to expand its own facilities-based services outside of CMA 667 using the full range of spectral alternatives." Application at 5. However, during the negotiations following the Bureau's April 14 Order and its June 22 Letter Ruling, the parties made no changes to the definitions set forth in AT&T's Final Offer. Consequently, AT&T takes issue with WCX's contention that changes to the roaming agreement's definitions somehow expanded the scope of WCX's rights to roam under that agreement beyond the limits described in the Bureau's Order.

On August 22, 2016, the parties submitted a final joint statement informing the Bureau that all other issues had been resolved and requesting that the Bureau finalize its April 14 Order.[46] The Bureau finalized its April 14 Order on September 22, 2016.[47] On October 24, WCX filed its Application for Review of certain aspects of the Bureau's April 14 Order.[48]

## III. ARGUMENT

### A. The Bureau Properly Evaluated WCX's Challenge To AT&T's Rates Under The Commercial Reasonableness Standard In Section 20.12(e).

As AT&T demonstrated to the Bureau, the proper legal standard governing the provision of LTE data roaming service by AT&T to WCX is the "commercial reasonableness" standard set forth in Section 20.12(e) of the Commission's rules.[49] Under that standard, the issue before the Commission is whether AT&T's final data roaming rates are "commercially reasonable."[50] As the Commission has previously stated, "the standard of commercial reasonableness" is intended "to accommodate a variety of terms and conditions in data roaming" and "allows host providers to control the terms and conditions of proffered data roaming agreements, within a general requirement of commercial reasonableness."[51] The Commission has also made clear that WCX, as the complainant, bears the burden of showing that AT&T's proposed rates are not

[46] September 22 Order ¶ 2.

[47] *Id.*

[48] Application at 1.

[49] *See* Responsive Brief of AT&T Mobility LLC at 2-4 (Aug. 31, 2015); *see also* AT&T Legal Analysis at 41-43.

[50] 47 C.F.R. § 20.12(e)(1).

[51] *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411, ¶ 33, 81 (2011) ("*Data Roaming Order*"); *see id.* ¶ 21 ("we adopt a general requirement of commercial reasonableness for all roaming terms and conditions, including rates, rather than a more prescriptive regulation of rates"); *id.* ¶ 78 ("the duty to offer data roaming arrangements on commercially reasonable terms and conditions will allow greater flexibility and variation in terms and conditions").

commercially reasonable.[52] If, as here, AT&T's proposal falls within the range of commercially reasonable rates, then that proposal complies with the Commission's regulations.[53]

In challenging this aspect of the Bureau's decision, WCX concedes that the commercial reasonableness standard governs the provision of data roaming services that are not interconnected with the public switch network.[54] WCX nevertheless argues that its request for data roaming service from AT&T should be assessed under the Commission's "automatic roaming" rules because it seeks "interconnected voice and data services and text messaging."[55] According to WCX, the Bureau's "failure to apply the automatic roaming to WCX's request for automatic roaming conflicts with the Commission's regulations, case precedent and established Commission policy."[56] WCX's position is baseless.

Contrary to WCX's argument, the automatic roaming rules do not apply to the data roaming services that WCX seeks from AT&T.[57] As previously noted, under the Commission's rules, the automatic roaming standards under Section 20.12(d) apply only to "CMRS carriers if such carriers offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls."[58]

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[52] Order ¶ 12.

[53] *Id.* ¶¶ 12, 23.

[54] Application at 3 n.13.

[55] *Id.* at 7.

[56] *Id.* at 8.

[57] *See* AT&T Legal Analysis at 41-43.

[58] 47 C.F.R. § 20.12(a)(2); *see In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, ¶ 54 (2007) ("*Automatic Roaming Order*"); *id.* ¶ 56 (declining to impose automatic roaming obligation on "non-interconnected features of a competitors' network").

Here, WCX has admitted that (i) "AT&T will not perform many of the same functions it has historically undertaken with regular roaming voice calls or text messages," (ii) "to AT&T the communications will look like non-interconnected communications," and (iii) "[t]o AT&T it will be no different than when WCX's customer is surfing the web or receiving an e-mail."[59] Consequently, in providing data roaming service to WCX, AT&T would not be offering a "data service that is interconnected to the public switched network."[60] Instead, it would be providing only non-interconnected data roaming service, and that would be the case regardless of what services WCX might be offering to its own customers.[61] Accordingly, by their terms, the automatic roaming rules do not apply to the data roaming services requested by WCX from AT&T.[62]

In its Application, WCX acknowledges the nature of the service it seeks from AT&T.[63] It contends, for example, that "all LTE roaming should be charged on a per-MB basis" because "AT&T has not implemented 'Service Aware Roaming" that would allow AT&T to "discern whether a given roaming packet is related to interconnected voice or data or commercial mobile data service."[64] But the applicability of the "automatic roaming" rules does not turn on what

[59] *See* WCX Legal Analysis (Second Amended Compl. at 271-72). WCX made the same point, that its usage would involve only data, during the course of its negotiations with **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[60] 47 C.F.R. § 20.12(a)(2).

[61] *See* AT&T Legal Analysis at 6, 41-43.

[62] *See* 47 C.F.R. § 20.12(a)(2). The Commission recently reaffirmed in the *Net Neutrality Order*, that such data service is governed by the Commission's data roaming rules, not by Title II, regardless of how the requesting provider elects to utilize that service. *See Protecting and Promoting the Internet*, GN Docket No. 14-28, ¶ 526 (2015) ("We therefore forebear from application of the [commercial mobile radio service] roaming rule, section 20.12(d), to [mobile broadband internet access service] providers, conditioned on such providers continuing to be subject to . . . the data roaming rule codified in section 20.12(e)"). WCX concedes that the *Net Neutrality Order* does not support application of Title II requirements to the data roaming at issue here. Application at 3 n.13.

[63] Application at 11-12.

[64] *Id.* at 12.

WCX ultimately does with the non-interconnected service that it requests from AT&T but rather on whether AT&T provides a "data service that is interconnected to the public switched network."[65] Because nothing in the record supports the conclusion that AT&T's data roaming service is interconnected to the public switched network, WCX's position as to the applicability of the automatic roaming rule should be rejected.

WCX's failure to accept this fundamental distinction between interconnected and non-interconnected services provided by AT&T permeates WCX's entire critique of this aspect of the Bureau's Order.[66] WCX thus criticizes the Bureau's various explanations as to why it did not evaluate AT&T's proposed data roaming rates using the automatic roaming rules.[67] But the distinctions that the Bureau drew, and that WCX criticizes, merely reflect that the AT&T data roaming service at issue is not interconnected to the public switched network, and, as a consequence, the automatic roaming rules have no application to that service.[68]

The same observation applies to the WCX's assertions regarding VoLTE (*i.e.*, Voice over LTE) service. Contrary to WCX's claim, the absence of a rate for VoLTE in AT&T's Final Offer was not based on an agreement by the parties that "there was no reason or ability to charge 'VoLTE packets' or 'SMS packets' at prices different than packets for commercial mobile data service."[69] To the contrary, as AT&T's Final Offer makes clear, "a VoLTE roaming rate will be

[65] In all events, to the extent that WCX seeks to expand the Commission's existing rules – rather than enforce the existing standards – it should have brought a declaratory ruling. 47 C.F.R. § 1.2; *Data Roaming Order* ¶ 82. Indeed, the declaratory ruling process is better suited to clarify rules for the "industry" as it allows "comment on the petition via public notice." 47 C.F.R. § 1.2(b).

[66] Application at 7-13.

[67] In explaining why AT&T's proposed data roaming rates were not evaluated using the automatic roaming rules, the Bureau explained that "RWA Agreement," which WCX had initially "urged the Commission to adopt as a form of relief, addressed only data roaming." Order ¶ 12 n.32. The Bureau further remarked that while WCX "Final Offer" "addresse[d] voice roaming as well as data roaming, it notably propose[d] no roaming rate for voice over LTE (VoLTE)." *Id.*

[68] *Id.*

[69] Application at 11-12.

determined when VoLTE roaming service is commercially available."[70] Consequently, there was no need to for the Bureau to address VoLTE.

WCX's criticism of the Bureau's handling of GSM-enabled voice services is likewise misplaced. WCX briefed no issue regarding AT&T's proposed rates, and there can be no dispute regarding the reasonableness of AT&T's rate for SMS service, which is to be provided without charge.[71] Further, contrary to WCX's hyperbolic claim that the Order "sets a precedent that nullifies the automatic roaming rule,"[72] the Bureau merely observed, accurately, that "WCX's brief did not discuss any dispute concerning voice or SMS roaming terms."[73] Consequently, WCX's failure to challenge the rates for interconnected services set forth in AT&T's Final Offer is unsurprising because WCX admits that those rates allow WCX to offer to its customers in CMA 667 "nationwide voice, texting and other low-bandwidth interconnected" roaming services.[74] Accordingly, there was nothing for the Bureau to resolve regarding these services.

Finally, there is no merit to WCX's claim that "AT&T never contended that its proposed terms and rates satisfied the automatic roaming rule" and "basically conceded that it would lose if the automatic roaming rule applies."[75] AT&T made no such concessions. To the contrary, AT&T explained that even if the Bureau were to conclude that Title II standards applied to this

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[70] Order ¶ 12 n.32.

[71] Order ¶ 12 n.32 ("WCX's brief does not address any dispute concerning these GSM-enabled voice roaming rates").

[72] Application at iii.

[73] Order ¶ 18 n.49 ("Inasmuch as WCX's brief only took issue with the 'per MB' data rates, we evaluate here only the parties' disputed data roaming rates. *See* 47 C.F.R. § 1.732(b) (requiring briefs to include 'all legal and factual claims . . . previously set forth in the complaint' and instructing that any claims 'previously made but not reflected in the briefs will be deemed abandoned'"); *see also id*. ¶ 12 n.32 (explaining that WCX proposes "no roaming rate for voice over LTE (VoLTE)"). WCX's arguments about its RWA model agreement, Application at 9-10, are irrelevant because that initial proposal was superseded by "WCX's subsequent Final Offer," Order ¶ 12 n.32, and WCX's legal briefs to the Bureau did not mention the RWA model agreement. *See* 47 C.F.R.§ 1.732(b). Likewise, WCX's failure to challenge AT&T's rates for interconnected services renders academic its discussion about WCX's ability to bring claims involving both the automatic roaming and data roaming rules in a single proceeding. Application at 7-9.

[74] Application at 24.

[75] *Id.* at 11.

case, AT&T's Final Offer satisfied those standards as well.[76] AT&T further noted that that its agreements addressing voice and text roaming had never been challenged as being unjust or unreasonable.[77]

### B. The Bureau Properly Considered the Data Roaming Rates in Agreements Between AT&T and Other Providers.

The Bureau properly analyzed the data roaming rate evidence presented by the parties and concluded that WCX had failed to show that AT&T's proposed rates were commercially unreasonable when assessed against that record evidence.[78] WCX disagrees, arguing that the Bureau erroneously concluded that WCX had not shown "the commercial unreasonableness of AT&T's proposed rates" and did so "by deeming AT&T's most expensive data roaming agreements to be the only relevant benchmark for commercial reasonableness."[79] WCX's arguments do not fairly characterize the Bureau's analysis and should be rejected.

*First*, contrary to WCX's argument,[80] the Bureau neither limited its review of the evidence nor did it simply presume that AT&T's data rates with other providers were reasonable.[81] Rather, as discussed below in detail, the Bureau analyzed all of the evidence, including the data submitted by WCX, and concluded that the rates reflected in AT&T's agreements were the most credible evidence of commercially reasonable data roaming rates.[82]

At the outset, the Bureau properly recognized that, under the *Data Roaming Order*, "the rates in other data roaming agreements are a factor that the Commission may consider in

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[76] *See* AT&T Legal Analysis at 43 n.239; AT&T's Responsive Brief at 1 n.1, 4 n.14.

[77] *Id*.

[78] Order ¶ 28.

[79] Application at 13-14.

[80] *Id.* at 14.

[81] Order ¶¶ 21-25.

[82] *Id.* ¶ 23.

assessing the commercial reasonableness of proposed roaming rates."[83] The Bureau further noted that AT&T had submitted an analysis of 30 separate data roaming agreements between AT&T and other domestic wireless carriers, which showed that for the period June 2014 to May 2015 the "weighted average effective roaming rate" that AT&T either paid or charged for data roaming service was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**[84] Likewise, a separate analysis of AT&T agreements that included LTE roaming reflected LTE roaming rates **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**[85] The Bureau further explained that, "[i]n the absence of other probative evidence, we find that the data roaming rates in the roaming agreements that AT&T has submitted in the proceeding, including the related analyses of AT&T's experts, are highly probative of the commercial reasonableness of AT&T's proposed data roaming rates."[86]

*Second*, there is no merit to WCX's complaint that AT&T improperly "omitted its 'strategic agreements' with the lowest rates from comparison," and that the Bureau effectively ignored that omission.[87] As the Bureau explained, AT&T produced its "strategic" agreements in discovery and "demonstrated that its 'strategic' agreements include rates and terms that address a broader set of rights, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** that are not directly related to

[83] *Id.*

[84] *Id.* ¶ 22.

[85] *Id.*

[86] *Id.* ¶ 23. The Bureau did not hold that "the very same agreements that" WCX contends "necessitated the *Data Roaming Order*" back in 2011 "are presumptively commercially reasonable." Application at iii. Indeed, the Bureau highlighted evidence that AT&T's proposed rates to WCX were **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** than "the 'average effective roaming rate' in 'arm's length' agreements within the last two years," *i.e.,* "approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per MB." *Id.* ¶ 22 n.60.

[87] Application at 14.

roaming and, as a result are not useful proxies in determining the commercial reasonableness of rates included in a proposed agreement that covers only roaming."[88] Notably, WCX offers no response to the Board's analysis relating to these "strategic agreements."

*Finally*, WCX's argument that the Bureau "simply dismissed the **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** agreement out of hand and refused to give it any weight whatsoever"[89] is not a fair or accurate description of the Bureau's analysis.[90] To the contrary, the Bureau acknowledged WCX's submission, but explained that WCX's ability to negotiate lower rates in an agreement with **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** "does not necessarily indicate that the rates AT&T proposed were commercially unreasonable."[91] That is because the data roaming rules contemplate that parties may "'negotiate different terms and conditions on an individualized basis, including different prices with different parties.'"[92]

Further, the Bureau highlighted that WCX's reliance on its agreement with **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** "fail[ed] to acknowledge WCX's own evaluation of the superiority of AT&T's network coverage," *i.e.*, WCX's assessment that "'AT&T is one of the only two providers with almost ubiquitous nationwide coverage and is therefore a "must have" roaming supplier.'"[93] Given WCX's own evidence endorsing the view that AT&T's network was "superior" to that of **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**, the Bureau cogently

[88] Order ¶ 24.

[89] Application at 16.

[90] Order ¶ 25.

[91] *Id.*

[92] Order ¶ 25 (quoting *Data Roaming Order*, 26 FCC Rcd at 5445-46, ¶ 68).

[93] *Id.* & n.70 (quoting WCX's expert's Supp. Decl. at 7-8).

concluded that "it is commercially reasonable for AT&T to expect roaming partners to pay more to roam on its network than on **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[94]

In sum, there is no basis for the Commission to conclude that the Bureau failed to properly consider the data roaming rates in agreements between AT&T and other providers.

### C. The Bureau Properly Analyzed WCX's Evidence of Retail and International Data Rates In Concluding That AT&T's Proposed Rates Were Commercially Reasonable.

WCX further contends that the "Bureau additionally erred by holding that WCX failed to demonstrate that AT&T's proposed roaming rates are 'substantially in excess of retail rates.'"[95] WCX asserts, without citation, that it "made a convincing demonstration that AT&T's proposed rates are commercially unreasonable because they exceed the then-prevailing rates in the United States by **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent."[96] WCX further claims that the Commission's "annual CMRS reports . . . match very closely to WCX's calculation of retail data rates of $0.01 per MB and are well below AT&T's calculations of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per MB."[97] WCX's challenge to the Bureau's analysis should be rejected.

In its Order, the Bureau accurately noted that "Commission orders have expressly refused to employ retail rates as a ceiling or a cap on roaming rates" and therefore rejected WCX's argument made below that "the commercial reasonableness standard requires proffered roaming

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[94] *Id.* ¶ 25. Finally, WCX's argument wholly ignores that the evidence presented by T-Mobile in the *Declaratory Ruling* upon which WCX relied supports the commercial reasonableness of AT&T's proposed data roaming rates. That data reflected T-Mobile's forecast of average data roaming rates of $0.18 per MB for 2014, which is well in excess of the rates proposed by AT&T to WCX. *See* AT&T's Legal Analysis at 23.

[95] Application at 17.

[96] *Id.*

[97] *Id.* at 19.

rates to be set at a level comparable to or below a provider's retail data rates."[98] The Bureau also explained that, under the governing standard, WCX had not "demonstrated that AT&T's proposed data roaming rates are 'substantially in excess' of AT&T's retail data rates" and therefore AT&T's rates do not run "afoul of the guidance in the *Declaratory Ruling*."[99]

WCX nevertheless insists that the Bureau erred "by limiting its analysis of retail rates strictly to AT&T."[100] That is simply false. The Bureau thoroughly examined all of the data submitted by WCX, but its analysis of these data led it to conclude that WCX had failed to provide "a cogent alternative analysis of retail rates."[101] Specifically, the Bureau pointed out that WCX's expert "selectively cited certain advertised rates for AT&T's more affordable 'shared family plans' while ignoring AT&T's highest advertised rate plan for single lines (e.g., $20 for 300 MB or approximately $0.07 per MB)."[102] The Bureau likewise noted that WCX's expert selectively relied upon AT&T Data-Only Plans that appeared to "apply to various consumer devices, such as tablets, cameras, and gaming devices, but not to smart phones," and failed to address the relevance of other advertised rates to "AT&T's analysis of its effective retail data rates."[103]

WCX also criticizes the methodology underlying AT&T's estimate of retail rates, arguing, for example, that estimate was "distorted by inclusion of line access charges, which are irrelevant to data roaming rates."[104] The Bureau, however, explained that these criticisms were unfair because WCX's own "retail rate calculations" included "the same line access fees and overage

[98] Order ¶ 26.

[99] *Id.*

[100] Application at 22.

[101] Order ¶ 26 n.75.

[102] *Id.*

[103] *Id.*

[104] Application at 19.

charges that AT&T included."[105] As a result, the Bureau rejected WCX's challenges to AT&T's estimate because "AT&T ha[d] employed a methodology consistent with that used in a report that WCX itself has submitted."[106]

WCX further argues that the Order should be set aside because certain annual reports by the Commission "match very closely to WCX's calculation of retail data rates of $0.01 per MB and are well below AT&T's calculations of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per MB."[107] WCX thus contends that the Bureau's "finding that prevailing retail rates range from **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is flatly and patently inconsistent with the Commission's own contemporaneous official estimate for AT&T and the industry at large in the *Seventeenth* and *Eighteenth* Reports and later the *Nineteenth* Report."[108] WXC's criticism suffers from multiple problems.

To begin with, WCX never introduced these reports into the record—a defect that WCX acknowledges, albeit implicitly, in a footnote that tries to brush aside WCX's failure by arguing that "[t]he 2014 and 2015 reports were both available to the Enforcement Bureau at the time the Order was issued."[109] But that is not the standard. Rather, the Commission's Rules make clear that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."[110] Here, *none* of the three

[105] Order ¶ 26 n.75.

[106] *Id.*

[107] Application at 19.

[108] *Id.* at 24.

[109] *Id.* at 19 n.87.

[110] 47 C.F.R. § 1.115(c).

reports upon which WCX now seeks to rely was introduced into the record by WCX or made the subject of testimony in the proceedings before the Bureau at the time the Order was issued.[111]

More significantly, there are serious issues as to the usefulness of the data in the three reports on which WCX now belatedly seeks to rely. Indeed, the Commission has specifically acknowledged these deficiencies in each of the reports. For example, in the "Seventeenth Report,"[112] the Commission expressly states that developments in the wireless industry—namely, the introduction of "shared data plans that bundled unlimited voice and texting with a data allowance for a single monthly fee"—have made the Commission's "estimates of the unit price of wireless voice and data revenues increasingly unreliable and difficult to come by."[113] In this report, the Commission further explained that it was "no longer able to report from the CTIA data an average revenue per text message, an average revenue per megabyte, or an average voice revenue per minute."[114] The Commission also noted that its "available estimates do not fully reflect the prices of all relevant mobile broadband service offered by U.S. wireless providers, and therefore are subject to certain caveats depending on the methodology used in the particular analyst report."[115]

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[111] Indeed, two of the three Reports were issued *after* the record for this proceeding had closed.

[112] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 14-135 Seventeenth Report*, 29 FCC Rcd 15311, ¶¶ 35-36, 140, 165-166 (WTB 2014) ("Seventeenth Report").

[113] *Id.* ¶ 35; *see also id.* ¶ 166 ("[I]t is difficult to calculate a meaningful estimate of the average revenue per megabyte actually being paid by consumers without knowing the composition of plans for each provider, the uptake rates for various plans, non-advertised promotions, and the proportion of legacy plans in a provider's customer base").

[114] *Id.* ¶ 35.

[115] *Id.* ¶ 39. The two subsequent reports highlighted by WCX likewise reaffirmed the Commission's conclusion that these data are of limited utility. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services,* WT Docket No. 15-125, Eighteenth Report, 30 FCC Rcd 14515, ¶¶ 26 n.54, 104 & note to Chart V.C.1 (WTB 2015) (explaining difficulty, as expressed in previous reports, of "identify[ing] sources of information that track mobile service prices in a comprehensive and consistent manner"); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market*

Finally, there is no merit to WCX claims that it showed that "international data roaming rates" and "Canadian retail data rates" support the commercial reasonableness of its rate proposal.[116] The Bureau expressly rejected that claim, explaining that "there [was] insufficient information in the record to make a determination" regarding commercial reasonableness based on those data.[117] Specifically, the Bureau pointed out that "WCX made no effort to submit a systematic review of MVNO or international roaming rates that would allow a determination that the rates it does cite represent appropriate reference points for determining the commercial reasonableness of AT&T's proposed data roaming rates."[118] WCX offers no substantive response to that analysis.[119]

In sum, there is no basis in the record for the Commission to conclude that the Bureau failed to properly analyze WCX's evidence of retail and international data roaming rates.

### D. The Bureau Did Not Err In Concluding That WCX Failed To Present Evidence That AT&T's Proposed Rates for Commercial Mobile Data Service Roaming Are Commercially Unreasonable under Section 20.12(e).

WCX finally argues that the Bureau "erred by requiring that WCX present evidence the Commission itself has found difficult to locate and analyze."[120] It contends that the Bureau "completely ignored the Commission's finding in several recent reports that 'there is a wide

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*Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 16-137, Nineteenth Report, __ FCC Rcd __, ¶¶ 26 n.60, 93 & note to Chart V.C.1 (WTB 2016) ("Nineteenth Report") (identifying limitations in reported data and acknowledging that "it is difficult to identify sources of information that track actual mobile wireless service prices in a comprehensive and consistent manner").

[116] Application at 18.

[117] Order ¶ 26.

[118] *Id.* ¶ 26 n.79.

[119] Rather, WCX's only response is that the Bureau "completely ignored the Commission's repeated findings in several recent reports that 'there is a wide variety of pricing plans offered by the different mobile wireless service providers" and that "it is 'difficult to identify source of information that track actual mobile wireless service prices in a comprehensive and consistent manner.'" Application at 23 (quoting *Eighteenth CMRS Report & Seventeenth Report*). That criticism is entirely misplaced because WCX never provided these "repeated findings" to the Bureau. *See* 47 C.F.R. § 1.115(c).

[120] Application at 23.

variety of pricing plans offered by the different mobile wireless service providers" and that "it is 'difficult to identify sources of information that track actual mobile service prices in a comprehensive and consistent manner.'"[121] WCX also insists that it "did an extraordinary survey of prevailing domestic and international roaming and retail prices, but the Bureau ignored it all and then held that WCX had failed in its burden."[122] WCX's arguments fail on multiple grounds.

At the outset, as noted above, WCX never presented the Bureau with any argument based upon any of the reports upon which it now belatedly seeks to rely, and therefore WCX's reliance upon those reports now cannot provide a basis for setting aside the Bureau's Order.[123] Moreover, as also discussed above, the Bureau did not disregard the evidence presented by WCX, but instead analyzed that evidence carefully under the standards set forth by the Commission, and assessed it against the competing evidence presented by AT&T.[124] Based on that analysis, the Bureau concluded that, in contrast to the analysis presented by AT&T, WCX had not "provided a cogent alternative analysis of retail rates."[125] Indeed, as previously noted, the Bureau highlighted that WCX's expert "selectively cited certain advertised rates for AT&T's more affordable 'shared family plans' while ignoring AT&T's highest advertised rate plan for single lines."[126] Likewise, for MVNO and international roaming rates, the Bureau found that "WCX made no effort to submit a systematic review" of such rates "that would allow a determination that the rates it d[id]

[121] *Id.*

[122] *Id.* at 23-24.

[123] 47 C.F.R. § 1.115(c).

[124] Order ¶¶ 18-28.

[125] *Id.* ¶ 26 n.75.

[126] *Id.* (highlighting deficiencies in the analysis provided by WCX's expert).

cite represent[ed] appropriate reference points for determining the commercial reasonableness of AT&T's proposed data roaming rates."[127]

In the end, WCX's claimed difficulty in obtaining evidence that supports its position that AT&T's proposed rates are not commercially reasonable is not a basis for excusing its failure to meet its burden under the Commission's data roaming rules.[128] WCX had the opportunity to conduct discovery under the Commission's rules, it had access to all of AT&T's roaming agreements, and it could have sought to depose AT&T's witnesses or obtain third-party discovery. WCX elected to do none of those things. Moreover, it never suggested to the Bureau that the record was incomplete or that the Bureau lacked sufficient evidence to render a binding decision under the Commission's roaming rules. Accordingly, the Commission should reject this argument.

## IV. CONCLUSION

For these reasons, the Bureau's Order should be affirmed. The Bureau carefully and thoroughly examined the claims presented by WCX and the evidence submitted by the parties, and properly applied the applicable standards set forth by the Commission to find that WCX had failed to demonstrate that AT&T's Final Offer violated the Commission's data roaming standards.

WCX insists that the Bureau's analysis of "non-interconnected commercial mobile data service roaming under Section 20.12(e)" has "priced WCX out of the nationwide commercial mobile data service market."[129] The Bureau, however, rejected that line of argument, explaining that WCX offered no evidence to effectively rebut AT&T showing that "comparable data roaming rates included in dozens of AT&T agreements with rural and small providers have not

[127] *Id.* ¶ 26 n.79.

[128] *See id.* ¶ 12.

[129] Application at 24.

rendered those providers' services unsustainable."[130] Further, WCX's admission that it will be "able to use AT&T's roaming for interconnected services" that are subject to the "automatic roaming" standards[131] completely undercuts its argument that it has been harmed by the Bureau's application of the commercial reasonableness standard to AT&T's data roaming rates. As explained above, the only roaming services subject to the automatic roaming rules are services interconnected to the public switched network. As to those services (i.e., voice, interconnected data and text), WCX did not challenge AT&T proposed rates and now concedes that it can compete in the market under the terms of the parties' Agreement.

Respectfully submitted,

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[130] Order ¶ 26 n.78.

[131] Application at 24.